IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3735 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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POPATJI BHARTHAJI VIHOL

Versus

COMMISSIONER OF POLICE

Appearance:

1. Special Civil Application No. 3735 of 2001

MS DR KACHHAVAH for Petitioner No. 1

MR S.S.PATEL, AGP for Respondent No. 1-3

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 18/09/2001

ORAL JUDGEMENT

In exercise of powers under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 ('the Act' for short), Commissioner of Police, Ahmedabad

City, Ahmedabad, vide order dated February 20, 2001 (Annexure-A to the petition) detained the petitioner/detenu.

2. The averments made in the petition and the grounds of detention manifest that the detaining authority has considered the petitioner as a bootlegger within the meaning of Section 2(b) of the Act and as 5 offences under the Prohibition Act are registered against the petitioner which are pending for trial and statements of two witnesses are recorded, according to the detaining authority activities of the petitioner are prejudicial to the maintenance of public order and therefore, powers under Section 9(2) of the Act are exercised by the detaining authority.

3. By filing this petition under Article 226 of the Constitution, petitioner has assailed the impugned order of detention on various grounds and prayed to issue a writ of habeas corpus or any other appropriate writ, order or direction quashing the impugned order of detention and setting him at liberty forthwith.

4. Though the petitioner has challenged the order of detention on various grounds, Ms. D.R.Kachuawah, learned advocate for the petitioner has restricted her arguments to the fact that subjective satisfaction recorded by the detaining authority cannot be considered as genuine. To bring home her aforesaid submission, she placed reliance on the statements of two witnesses which were recorded on February 16, 2001 and February 17, 2001 and verified by the detaining authority on February 19, 2001 and immediately on the next date i.e. on February 20, 2001 the order of detention came to be passed and therefore, it can be said that the detaining authority has not exercised powers under Section 9(2) of the Act properly as there was no enough material necessitating the detention of a person in custody. Besides this, the detaining authority has observed in its order that petitioner would indulge in the same activity after being released on bail and therefore, it has become necessary to detain him. Therefore, on the aforesaid two grounds, subjective satisfaction recorded by the detaining authority cannot be called genuine and therefore, the order of detention deserves to be quashed and set aside.

5. Mr S.S.Patel, learned AGP appearing on behalf of the respondent State has opposed the petition by making oral submissions and urged that the petition may be rejected.

6. I have considered the submissions advanced by the learned advocates appearing for the parties. I have also perused the averments made in the petition as well as the documents annexed therewith and the impugned order.

7. A similar question arose in the case of KALIDAS C KAHAR V. STATE 1993 (2) GLR page 1659 in which proposal was made on October 16, 1992 and detention order was passed October 17, 1992 and therefore it was held to be a wrong exercise of power under Section 9(2) of the Act which has affected the detenu's right of making an effective representation under Article 22(5) of the Constitution and therefore, the detention order was quashed.

8. Applying the aforesaid principles laid down by this Court to the facts of the present case, it is clear that the present case is identical to the case referred to above and here also statements of two witnesses were recorded on February 16, 2001 and February 17, 2001 and verified by the detaining authority on February 19, 2001 and immediately on the next day i.e. February 20, 2001, the detention order came to be passed, and therefore, order of detention stand vitiated.

9. So far as five cases under the Prohibition Act registered against the petitioner are concerned, the detaining authority, in the impugned order has observed that the petitioner after being released on bail would again indulge in similar activities and therefore to prevent the said illegal activities which are prejudicial to the maintenance of public order, it was necessary to detain the petitioner. In this connection it would be appropriate to refer to the judgement in the case of AMRITLAL VS. UNION GOVERNMENT 2000 AIR SCW 4203. In the said case it has been observed that there must be cogent material before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. Likelihood of detenu's moving an application for bail is not a cogent material and detention order based on such material is liable to be quashed. The reasoning that there is "likelihood to be released on bail" is different from "likelihood of his moving an application for bail".

10. Applying the aforesaid principles laid down by the Hon'ble Supreme Court to the facts of the present case, in the instant case also the detaining authority has considered only the aspect of petitioner being

released on bail and thereafter to indulge in similar activity, but on what basis the detaining authority has come to the conclusion that the petitioner would continue to indulge in similar activities is not mentioned in the order of detention. Therefore, order of detention stands vitiated and the petition deserves to be allowed.

11. For the foregoing reasons, petition succeeds and is accordingly allowed. The impugned order of detention dated February 20, 2001 is hereby quashed and set aside. The petitioner/detenu is ordered to be set at liberty forthwith if not required in connection with any other case. Rule is made absolute. No order as to costs. Direct service is permitted.

(A.M.Kapadia, J)

Jayanti*